Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-570

In The

# Supreme Court of the United States

October Term, 1985

PAT S. HOLLOWAY,

*Petitioner,*

vs.

JUDGE DEE BROWN WALKER,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT JUDGE DEE BROWN WALKER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH L. KING
BRUCE W. CLAYCOMBE
JONES, CLAYCOMBE & KING
2626 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 954-0123
*Attorneys for Respondent Judge Dee Brown Walker*

November 4, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

15pp

## QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals erred when it held that Respondent Judge Dee Brown Walker was judicially immune from a §1983 action for damages because the acts of Judge Dee Brown Walker were judicial acts, performed when Judge Walker had subject matter jurisdiction of the matter pending before him?

## TABLE OF CONTENTS


| | Pages |
|---|---|
| QUESTION PRESENTED | i |
| INDEX OF AUTHORITIES | iii |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 2 |
| CONCLUSION | 7 |

# INDEX OF AUTHORITIES

Pages

CASES:

*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) ..... 2, 6

*Dennis v. Sparks*, 449 U.S. 24 (1980) ..... 3

*Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985) ..... 4, 5, 6

*Hartford Acc. & Ind. Co. v. Farrell*, 107 S.W.2d 442 (Tex. Civ. App.—Ft. Worth, 1937 writ dism'd) 5

*Humble Exploration Co., Inc. v. Walker*, 641 S.W. 2d 941 (Tex. App.—Dallas, 1982 writ ref'd n.r.e) ..... 4

*McHenry v. Bankers' Trust Co.*, 206 S.W. 560 (Tex. Civ. App.—Galveston, 1918 writ ref'd) ..... 5

*Pierson v. Ray*, 386 U.S. 547 (1967) ..... 2

*Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981) ..... 3, 6

*Stump v. Sparkman*, 435 U.S. 349 (1978) ..... 4, 5

*Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980) ..... 5

*United States v. Carver*, 260 U.S. 482 (1923) ..... 3

*Ex Parte Virginia*, 100 U.S. 339 (1879) ..... 7

STATUTES:

42 U.S.C. §1983 ..... 2, 3

Tex. Rev. Civ. Stat. Ann., Art. 2297 ..... 5

No. 85-570

In The

# Supreme Court of the United States

October Term, 1985

PAT S. HOLLOWAY,

*Petitioner,*

vs.

JUDGE DEE BROWN WALKER,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT JUDGE DEE BROWN WALKER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Judge Dee Brown Walker respectfully requests the Court to deny the petition for a writ of certiorari sought to overturn the opinion of the Fifth Circuit Court of Appeals in this case.

## STATEMENT OF CASE

Humble Exploration Company, Inc. is now known as HECI Exploration Company, Inc. ("Humble"). Although Humble and Sterling Pipeline Company were parties to

the original district court action and to the appeal in the Fifth Circuit, they have not petitioned for a writ of certiorari. Petitioner Pat S. Holloway is no longer the owner of the stock of either of the companies.

After the Fifth Circuit's decision in this case, the District Court for the Northern District of Texas granted summary judgment in favor of Judge Walker on all the plaintiffs' claims under § 1983. That decision has been appealed by Petitioner Pat S. Holloway. The appeals of Humble and Sterling Pipeline Company were dismissed by the Fifth Circuit at the request of Humble and Sterling Pipeline Company on August 12, 1985. Petitioner Pat S. Holloway's motion for reconsideration was denied on September 16, 1985.

---

## REASONS FOR DENYING THE WRIT

### 1. All acts of Respondent Judge Dee Brown Walker alleged to have damaged Petitioner were "judicial acts".

Federal law has clearly established that judges of courts of general jurisdiction are absolutely immune from monetary liability "for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). It is also established that judicial immunity is in no way diminished in a proceeding under 42 U.S.C. § 1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

The Fifth Circuit Court of Appeals was correct in deciding Respondent Judge Walker had absolute judicial immunity for the conduct alleged in the civil rights complaint against the judge. The Fifth Circuit correctly re-

lied on *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Dennis v. Sparks* the essential claim of plaintiff was that an "injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants . . ." *Id.* at 27. This court stated, "The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge . . . ., and as the case comes to us, the judge has been properly dismissed from the suit on the immunity grounds." *Id.* at 28.

Petitioner argues, however, that the Fifth Circuit has placed too much reliance on *Dennis v. Sparks* and should follow the Ninth Circuit case of *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981), apparently because a writ of certiorari was denied that case by this Court. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

Furthermore the *Rankin* case is easily distinguished from the case before the court. In *Rankin* the Ninth Circuit stated:

> If, as alleged, Judge Zeller knew the jurisdictional allegations to be fraudulent, or if valid Kansas statutes expressly foreclosed personal jurisdiction over a proposed ward in *ex parte* proceedings for temporary guardianship, then the judge acted in the clear and complete absence of personal jurisdiction. If his acts were part of a conspiracy, he is properly held responsible for the consequences.

In view of the suggested complete lack of jurisdiction, the *Rankin* case may be viewed as correctly decided because it remanded the case for further factual inquiry on that issue since there was evidence in the record suggesting that Judge Zeller knew he had no jurisdiction in the case.

**2. All acts of Respondent Judge Walker were not performed in the clear absence of all jurisdiction.**

In the instant case the Fifth Circuit has decided correctly that Judge Walker had subject matter jurisdiction over the proceedings at all times. 765 F.2d at 530-531; Appendix to Petition for Certiorari at B-14, 15.

Again Petitioner argues that the Fifth Circuit has misconstrued *Stump v. Sparkman*, 435 U.S. 349 (1978) which held that absolute judicial immunity does not extend to acts performed in the clear absence of all jurisdiction. However, as this Court pointed out, the term "jurisdiction" must be construed broadly where the issue is the immunty of the judge. *Id.* at 357.

Petitioner contends that the Dallas Court of Appeals decision expressly informed Judge Walker of his lack of jurisdiction to continue the receivership. Petitioner fails to mention that the receivership to which the Dallas Court of Appeals addressed itself was the receivership of Humble, a company which is not a party to this petition. The receivership over the assets of Petitioner Pat S. Holloway was not dissolved. The court of appeals stated:

> Appeals from the appointment of temporary receivers of Sterling and Holloway are still pending in this court and such appointments have not been vacated by this court. Accordingly, the petition for writs of prohibition of Sterling and Holloway are denied.

*Humble Exploration Co., Inc. v. Walker*, 641 S.W.2d 941, 9 (Tex. App.—Dallas, 1982 writ ref'd n.r.e.); Appendix to Petition for Certiorari at C-4.

Furthermore as the Fifth Circuit pointed out, the writ of prohibition issued by the Dallas appellate court "did not purport to determine that Walker's court was without gen-

eral subject matter jurisdiction . . . " 765 F.2d at 530; Appendix to Petition for Certiorari at B-14. And as the court pointed out in footnote 4, "[T]he Texas Supreme Court does not consider a judge to be exposed to suit under Texas law merely because he would be subject to a mandamus order."

Under Texas law, a district court is one of general jurisdiction and is responsible for the actions of any receiver it appoints and the affairs of any business over which a receiver has been appointed. Tex. Rev. Civ. Stat. Ann., Art 2297; *Hartford Acc. & Ind. Co. v. Farrell,* 107 S.W.2d 442 (Tex. Civ. App.—Ft. Worth, 1937 writ dism'd); *McHenry v. Bankers' Trust Co.,* 206 S.W. 560 (Tex. Civ. App.—Galveston, 1918 writ ref'd). Judge Walker's decisions with regard to the operation of the business of Humble were judicial acts.

The quoted language from *Turner v. Raynes,* 611 F.2d 92 (5th Cir. 1980) contained in the petition for certiorari is misleading and taken out of context. *Turner* involved a court of limited jurisdiction, a justice court. The quoted language was describing the limitation of judicial immunity of the judge of a court of limited jurisdiction. As pointed out by both the *Turner* court and this court in *Stump v. Sparkman,* 435 U.S. 349 (1978), a court of general jurisdiction, such as the court of Judge Walker, is quite another matter.

**3. The efficient administration of justice is furthered by denying the petition for certiorari because of the fundamental policies underlying absolute judicial immunity.**

The Fifth Circuit wrote that even if the case before it were one of first impression, it would decline to follow

*Rankin v. Howard, supra,* because it was "inconsistent with the fundamental policies underlying judicial immunity". 765 F.2d at 527; Appendix to Petition for Certiorari at B-11.

The reasons enumerated for the necessity of judicial immunity by this Court in *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872) are no less valid 113 years later. Those are:

1) a judge must be able to act upon his own convictions;

2) the competing interests and controversy inherent in a contest before a court make it likely the losing party may ascribe malevolent motives to the court;

3) if judges are faced with the prospect of damage actions, they may be driven to distractive self-protection devices;

4) remedies such as appeal or impeachment decrease the need for private rights of action; and

5) the ease of alleging bad faith makes a qualified "good faith" immunity worthless.

*Bradley,* 80 U.S. (13 Wall.) at 347-54. The Fifth Circuit suggests that a sixth factor is the need for finality. 765 F.2d at 528; Appendix to Petition for Certiorari at B-12.

There is little difference between the ease of alleging "bad faith" and the ease of alleging conspiracy or bribery. In fact all *Bradley* factors retain their viability in cases of the sort before the court. *Id.*

**4. Respondent Judge Walker did not violate any ministerial duty.**

Petitioner's ministerial act argument is no more than his "non-judicial acts" argument in new garb and still does not pass muster. In *Ex Parte Virginia*, 100 U.S. 339 (1879), (a criminal habeas corpus case) the court distinguished "ministerial acts" from "judicial acts".

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads.

The Writ of Prohibition issued to Judge Walker concerns conduct which only a judge is authorized to perform and is therefore by its character judicial conduct. This Court's distinction makes it clear that acts that can only be performed by a district judge are not ministerial acts.

———o———

## CONCLUSION

For the above-enumerated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH L. KING
BRUCE W. CLAYCOMBE
JONES, CLAYCOMBE & KING
2626 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 954-0123

*Attorneys for Respondent*
*Judge Dee Brown Walker*